AUG 10 1944
CHARLES ELMORE CROPLEY

No. 350

Supreme Court of the United States.

OCTOBER TERM, 1944.

EMPLOYERS GROUP OF MOTOR FREIGHT CARRIERS, INC., ET AL.,
Petitioners,

v.

NATIONAL WAR LABOR BOARD ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
AND
BRIEF IN SUPPORT THEREOF.

J. NIXIAN BEALL,
Attorney for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Justices of the Supreme Court of the United States:

The petition of the Employers Group of Motor Freight Carriers, Inc., for a writ of certiorari to be directed to the United States Court of Appeals for the District of Columbia, to bring before this Honorable Court the judgment of said Court of Appeals, entered June 2, 1944, affirming the judgment of the District Court of the United States for the District of Columbia:

I.

Statement of Matter Involved.

The petitioners are motor carriers and an association of motor carriers. The carrier employees, under a closed-shop contract, exercised their right to reopen the wage provisions thereof and refused to continue work at the previously going rate. The National War Labor Board assumed jurisdiction of the dispute and its Trucking Commission heard the same in February, 1943, after which hearing the Commission took the case under advisement.

The President of the United States by Executive Order 9328 (8 F.R. 4681), which was promulgated on April 8, 1943, withdrew from the National War Labor Board the right to grant wage increases to remove "inequalities." The Trucking Commission released a proposed decision on April 10, 1943, disregarding this limitation upon its jurisdiction and ordered a wage increase to remove alleged inequalities.

The National War Labor Board was asked to review the action of its Commission, and appeal was made to the Economic Stabilization Director both before and after approval of the Trucking Commission decision, but both requests were denied. The Economic Stabilization Director approved the proposed decision April 30, and the National War Labor Board gave its final approval thereto to become effective on April 30, 1943.

On June 14, 1943, the petitioners brought their complaint in the District Court of the United States for the District of Columbia, for an injunction to set aside the Board's order, alleging the same to be unlawful, and to result in irreparable injury. The National War Labor Board, by its attorneys, filed a motion to dismiss on the grounds that the Court had no jurisdiction over the subject-matter, and that no claim had been stated upon which relief could be granted. The Court sustained the motion.

On Appeal to the Court of Appeals for the District of Columbia, the Court of Appeals, under date of June 2, 1944, handed down a written opinion (R. 60-67, inclusive) sustaining the findings of the District Court. From the findings and rulings of the Court of Appeals this petition is filed.

II.

Jurisdiction.

Jurisdiction of this Court is derived from U.S.C., 1940 ed., Title 28, § 347 (a).

III.

Specification of Errors.

The Court of Appeals erred—

1. In refusing to require the respondents to conform their decision to Executive Orders 9250 (7 F.R. 7871) and 9328, *supra*, and to their jurisdiction.

2. In refusing to find and decide that the respondents acted arbitrarily and capriciously in refusing the petitioners a further hearing in view of Executive Order 9328.

3. In finding that the National War Labor Board's orders are not reviewable, on the ground that there is no statute authorizing review of them.

4. In refusing to recognize the legal and economic penalties attending non-compliance with the Board's orders when the Court stated:

> "No one could maintain, either judicial or administrative proceedings against the appellants upon the authority of the Board's order" (R. 62);

and again:

> "But neither Executive Order 9250 nor any other regulation forbids adherence to an old wage scale after

the Board has approved a new one. Appellants will not, by declining to adopt the new scale, subject themselves to the penalties which the Inflation Control Act provides for violation of its provisions, or to any other penalties'' (R. 63).

5. In refusing to find that the petitioners were entitled to judgment on the pleadings and in affirming the judgment of the District Court.

IV.

Prayer.

WHEREFORE the petitioners respectfully pray that a writ of certiorari may issue directed to the United States Court of Appeals for the District of Columbia commanding that Court to certify and to send to this Court a full and complete transcript of the record of all proceedings of said Court in the above-entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

J. NINIAN BEALL,
Attorney for Petitioners.

RALPH H. CAHOUET,
Of Counsel.

August 15, 1944.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Statement.

The only issue to be decided by this Court is whether the petitioners had a right under the general equity powers of the Courts to a review of the clear violation of jurisdiction by the National War Labor Board Trucking Commission, the National War Labor Board, and the Economic Stabilization Director, and to secure conformity of the decision to the lawful jurisdiction by order of the Court.

The petitioners contend that the general equity powers are sufficiently broad to permit relief, which should have been granted.

The Court of Appeals for the District of Columbia in its decision held that general equitable principles did not authorize review, and stated:

> "No money, property, or opportunity has been taken or withheld from the appellants, and no one threatens any such act. No one threatens, and no one could maintain, either judicial or administrative proceedings against the appellants upon the authority of the Board's order. In these circumstances there is no occasion for review of the Board's order" (R. 62).
>
> . . . . . .
>
> "The regulations promulgated by the President in Executive Order 9250 forbid the adoption, without the Board's approval, of a new wage scale. But neither Executive Order 9250 nor any other regulation forbids adherence to an old wage scale after the Board has approved a new one. Appellants will not, by declining to adopt the new scale, subject themselves to the penal-

ties which the Inflation Control Act provides for violation of its provisions, or to any other penalties" (R. 63).

The Court also held that—

"The legislative history of the War Labor Disputes Act implies a positive intention that these orders should not be reviewed" (R. 61).

Regulations and Statutes Involved.

The National War Labor Board was created by Executive Order 9017 (7 F.R. 237) January 12, 1942. The jurisdiction of the National War Labor Board was defined by the President in Executive Order 9250 (7 F.R. 7871) October 3, 1942. This latter order was issued at the direction of Congress as provided in the Emergency Price Control Act of 1942, 50 U.S.C. 901; c. 26, 56 Stat. 23, as amended October 2, 1942, by the Inflation Control Act of 1942, 50 U.S.C. 961; c. 578, § 2, 56 Stat. 765, which required the President to issue a general order stabilizing prices, wages and salaries at the level of September 15, 1942, subject to such necessary adjustments to aid in the prosecution of the war or correction of gross inequities as might be determined by him. Executive Order 9328 (8 F.R. 4681), promulgated April 8, 1943, reduced the specific exceptions previously enumerated in Executive Order 9250, *supra*, with respect to general wage increases, such as here, to eliminate the approval of increases above the September 15, 1942, wage level for the purpose of eliminating inequalities.

Argument.

There is a right to relief under the general equity powers of the Court which should have been granted. Executive Order 9250 made mandatory the approval of any increase or decrease in wages by the petitioners subject to the approval of the National War Labor Board. The employees refused to continue to work for their then effective wages and requested a wage change,[1] which request petitioners were obligated to recognize under the effective contract between petitioners and the employees. The petitioners were obliged to submit to the jurisdiction of the National War Labor Board. The petitioners' only alternative was to have ceased doing business.[2] If they had made a wage change without approval of the National War Labor Board, none of the wages paid without such approval could have been credited as business expense for income tax purposes. They would also be subject to prosecution under Section 11 of the Emergency Price Control Act of 1942, 50 U.S.C. 901; c. 26, 56 Stat. 23, as amended October 2, 1942, by the Inflation Control Act of 1942, 50 U.S.C. 961; c. 578, § 2, 56 Stat. 765.

It is not correct to state that "No money, property, or opportunity has been taken or withheld from the appellants" (R. 62) and that "neither Executive Order 9250 nor any other regulation forbids adherence to an old wage scale after the Board has approved a new one . . ." (R. 63), because the petitioners could not adhere to the old wage scale and decline to adopt the new scale and continue in business because the employees insisted upon a wage change. A re-

[1] The only provisions of the contract which could be reopened were the wage provisions, which were in dispute.

[2] It is not clear that even such a course would have been available to them in view of their legal obligations as certificated common carriers engaged in interstate commerce. Certainly they could not have ceased business without jeopardizing their operating rights under their certificates because of cessation of operations.

fusal to meet the new scale by ceasing the conduct of business would not subject petitioners to the penalties of the Inflation Control Act, but establishment of a scale without submission to the National War Labor Board clearly would.

The right to do business is a property right. The exercise of the right is subject to reasonable regulation. Here the effect of regulation and statute is to take money and property rights from the petitioners in a manner contrary to the jurisdiction conferred by Executive Order and statute. It is obvious that a vast control is exercised over the entire economy, and the money and property rights of business, under existing circumstances where the increase or decrease of practically all wages throughout the entire country is subject to approval of the National War Labor Board.

In *Utah Fuel Co. et al.* v. *National Bituminous Commission*, 306 U.S. 56, 60, the Court said:

> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity. The jurisdiction of a District Court is to be 'determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not.' "

In *Waite et al.* v. *Macy et al.*, 246 U.S. 606, the Court said:

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a

usurpation by calling it a decision on purity, quality or fitness for consumption. . . . The Secretary and the board must keep within the statute, *Merritt* v. *Welsh*, 104 U. S. 694, which goes to their jurisdiction . . ."

Again, in *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, it was stated:

"The courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

It was stated by the Court of Appeals in this case:

"Judicial review of administrative action cannot be confined by a formula, and existing categories may be extended if need arises . . ." (R. 62).

It is submitted that the petitioners' right to relief falls within existing categories. It is clear that the nature and substance of the violation of regulation and statute, the excess of jurisdiction and the direct and inevitable impact upon the petitioners is of precisely the same kind as was presented in the cited cases wherein the court extended relief. There is no difference which can be recognized at law between the loss caused by threatened divulgence of cost information in the Utah case, the burden of removing tea from the country in the Waite case, the trade loss from the non-reception of mail in the McAnnulty case, and the loss

to the petitioners through paying large sums in wages at an illegally high level.

In the first case, the complaining party was ultimately faced with enforcement of a subpoena by court order; in the second by condemnation and loss of merchandise if there was persistent noncompliance; in the third by undefined loss of business orders (compliance was involuntary); and in the instant case by cessation of business if petitioners did not submit to respondents for decision, or loss of expense credits for tax purposes, and prosecution if they made wage changes through independent action, assuming that such opportunity was theirs.

In considering the problem in the light of cases where the penalty to the party aggrieved cannot be applied until after an order is made, it must be realized that under the existing mechanism of statute and Executive Order the petitioners' plight is even more difficult because they are under pressures for compliance both before and after decision.

The issues in this case cannot be deemed settled by any inferences to be drawn from Congressional debates, 89 Cong. Rec. 3898, 5754-5, 5791, 5794-5, relating to the War Labor Disputes Act, 78th Congress, 1st Session, Ch. 144, Pub. Law 89. The illegal order was adopted by the respondents long before the passage of that legislation on June 25, 1943, and the War Labor Board was created by Executive Order on January 12, 1942. The material amendment to the Emergency Price Control Act was passed October 2, 1942, and the Executive Orders relating to the standards of decision were adopted October 3, 1942, and April 8, 1943, respectively, all antedating both the Congressional discussion and the passage of further legislation. This later legislation in no way limited, repealed or superseded rights, powers or duties previously established. It is obvious that Congressional discussions with respect to the content of that legislation were in no sense related

to decisions and orders made and established prior to the passage of the War Labor Disputes Act.

If it be suggested that the point is disposed of on too narrow a ground, it may be said that it is true that the National War Labor Board could not enforce its own orders by specific penalty without delegation of authority to it by Congress, and it is clear that no such power was given to the National War Labor Board by the terms of the War Labor Disputes Act, *supra*. It is not true, however, that the right to equitable relief depends upon reference to a statute, for the general equity powers are broader than mere statutory enactment and exist independently thereof. If Congress had undertaken to cut off the right to relief under the general equity powers, it would have been obliged to have specifically done so.

This court has recognized that the general equity powers are broader than the rights to review flowing from statutory enactment, when in considering statutory limitations upon the right to review action of the Federal Communications Commission, in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 429, 430, in which Frankfurter, J., in a dissenting opinion, said:

> "Congress did not leave opportunity for reviewing damaging action by the Federal Communications Commission to the general equity powers of the district courts. *It circumscribed the power of the courts in relation to the Commission in the most detailed way.*" (Italics supplied.)

Congress could not repeal the power of the court to review cases by discussion directed to the problem of whether or not it should specially provide for judicial review in a statute which it later adopted containing no reference thereto.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia should be granted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 60–67) is reported at 143 F. (2d) 145.

JURISDICTION

The judgment of the District Court was entered on November 22, 1943 (R. 55). The judgment of the Court of Appeals was entered on June 2, 1944 (R. 68). The petition for a writ of certiorari was filed on August 16, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a "directive order" of the National War Labor Board, issued for the purpose of

resolving a wage dispute between the petitioners and their employees, is reviewable in an injunctive proceeding brought in the federal courts.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the statutes and regulations involved are set forth in the Appendix, pp. 11–18, *infra.*

STATEMENT

On June 14, 1943, the petitioners filed a complaint in the District Court of the United States for the District of Columbia, seeking to enjoin and annul a "directive order" of the National War Labor Board which was issued in order to adjust a labor dispute between the petitioners and their employees (R. 10–51). The complaint, as amended (R. 52–53), named as respondents, in their individual and official capacities, the Board and its members, the National War Labor Board Trucking Commission and its members; and also named the Administrator of the Office of Price Administration, and the Director of Economic Stabilization.

The material allegations of the complaint may be summarized as follows: The petitioners are motor carriers engaged in the transportation of freight by truck, and a nonprofit corporation representing such carriers (R. 12). In November 1942, a dispute arose between the petitioners and their employees over the wage and hour provisions to be included in a collective bargaining agree-

ment (R. 17). The Conciliation Service of the Department of Labor unsuccessfully attempted to conciliate the dispute (R. 17). Thereafter, on January 22, 1943, the Secretary of Labor certified the dispute to the Board, pursuant to Executive Order No. 9017 under which the Board was established (R. 17; see Appendix, pp. 13–15, *infra*). After a hearing, the Board acting through its agency, the National War Labor Board Trucking Commission, passed upon the merits of the dispute between petitioners and their employees by issuing a "directive order" on April 10, 1943, prescribing a wage increase. This order was approved by the Director of Economic Stabilization on April 30, 1943, after receiving a report from the Price Administrator that the proposed wage increase would probably entail an increase in the petitioners' trucking rates. (R. 18–21, 26–30, 48–51.) The complaint charged, further, that the Board's order (1) violated Executive Order No. 9328 of April 8, 1943, which allegedly modified preexisting standards governing wage increases (see Appendix, p. 17, *infra*); and (2) was "arbitrary and capricious" and "contrary to the evidence" (R. 21). The petitioners also alleged that the Board's order would cause them "irreparable injury," and that it would be "impossible" to "absorb" the proposed wage increase (R. 12, 23).

The respondents moved to dismiss the complaint or, in the alternative, for summary judgment, on the grounds that the court had no jurisdiction over

the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted (R. 53–54). In support of the motion, the respondents filed an affidavit (R. 57–58) by Lloyd K. Garrison (then Executive Director and General Counsel of the Board), stating that the Board had not reported to the Director of Economic Stabilization the petitioners' failure to comply with the Board's order; that the Director had not taken jurisdiction of the matter on his own motion; and that the Director, in a letter to the Board, had disclaimed any authority to invoke sanctions under Executive Order No. 9370 of August 16, 1943, because in the Director's judgment, the Order applied only to Board orders issued pursuant to the War Labor Disputes Act of June 25, 1943, enacted two months after the order involved here. (See Appendix, pp. 17–18, *infra*.)

The District Court dismissed the complaint and granted summary judgment for the respondents (R. 55). On appeal to the Court of Appeals for the District of Columbia, the judgment was affirmed (R. 60–68).

ARGUMENT

While the question presented is important,[1] we believe the decision below is so clearly correct that

[1] It may be noted that the importance of the question is substantially diminished by the fact that it can arise only with respect to orders issued by the Board prior to June 25, 1943, when the War Labor Disputes Act was enacted. See pp. 6–7, *infra*.

further review is not warranted. There is no statute or executive order purporting to authorize judicial review of the Board's orders. The petitioners contend that the federal courts may review such orders under their general equity powers. We submit that both courts below were correct in holding that such a contention is untenable.

1. The Board's order does not alter the legal rights of the parties, or impose legal sanctions of any kind. Failure to observe the wage proposals in the order does not subject the petitioners or anyone else to legal enforcement proceedings or to penalties of any nature. Neither the Inflation Control Act nor Executive Order No. 9250 (see Appendix, pp. 11, 15–16, *infra*) forbids adherence to an old wage scale even after approval of a new wage scale by the Board.[2] The order merely authorizes, but does not compel, the adoption of the proposed wage increase. As the court below properly observed, "no one could maintain either judicial or administrative proceedings against" the petitioners "upon the authority of the Board's order" (R. 62). In such circumstances, the order is a public statement of the

[2] Under Section 5 of the Inflation Control Act, "No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act." The regulations promulgated by the President in Executive Order No. 9250 provide that "No increases in wage rates * * * shall be authorized * * * unless the National War Labor Board has approved such increases * * *." See Appendix, pp. 11, 15, *infra*.

Board's opinion as to how, in view of the paramount national interest created by the war, the dispute between the parties should equitably be resolved. Plainly, therefore, the Board's order contains none of the incidents requisite for judicial review in the federal courts. *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299; *Pennsylvania R. R. Co.* v. *Labor Board*, 261 U. S. 72; *Pennsylvania Federation* v. *Pennsylvania R. R. Co.*, 267 U. S. 203; *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297; *Stark* v. *Wickard*, 321 U. S. 288.

The record contains no allegation or indication that the respondents have taken or have threatened any action to compel obedience to the order. The Board has not reported or threatened to report the petitioners' noncompliance to the President or to the Director of Economic Stabilization, and the latter has not taken jurisdiction of the matter on his own motion (R. 57). While Executive Order No. 9370 of August 16, 1943, authorizes the Director of Economic Stabilization, when the War Labor Board reports noncompliance with one of its orders, to direct withdrawal of priorities and Government contracts "in order to effectuate compliance," the Director has expressly disclaimed any authority to invoke its sanctions here, on the ground that the Order applies only to Board orders issued pursuant to the War Labor Disputes Act, which was enacted about two months after the present

order was issued (R. 57–58).[3] In the absence of any threat on the part of any respondent to apply sanctions or to take any other step to enforce the Board's order, there is no basis for injunctive relief. *National War Labor Board* v. *Montgomery Ward & Co.*, App. D. C., No. 8732, decided July 19, 1944; *Baltimore Transit Co.* v. *Flynn*, 50 F. Supp. 382 (D. Md.); cf. *Watson* v. *Buck*, 313 U. S. 387, 399–400; *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 237–238; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Boggus Motor Co.* v. *Onderdonk*, 9 F. Supp. 950 (S. D. Tex.).[4]

Whether the petitioners' noncompliance with the Board's order will ever be referred to either

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[3] The Director's only function in the labor dispute between petitioners and their employees was to approve the wage increases provided for in the Board's directive order, if such increases might require a change in the petitioners' transportation rates; and the only function of the Price Administrator was to consider whether such wage increases would be likely to require a change in the petitioners' transportation rates (see Appendix, pp. 15–16, *infra*). Both of these functions have been executed in the instant case.

[4] The authorities cited by petitioners (Pet. 8–9) do not support their argument. In each case the administrative action sought to be reviewed was, as the court below observed, "directly injurious to legally protected interests of the plaintiff" (R. 61). *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, involved a suit to obtain mail (including checks, money orders, and cash) which the Post Office Department was withholding from the plaintiff. *Waite* v. *Macy*, 246 U. S. 606, involved a suit to import tea which customs officials were excluding. *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56, con-

the Director of Economic Stabilization or to the President, and whether the President would in such event determine that possession of the petitioners' plants and facilities should be taken by the United States, are matters which at present lie in the realm of speculation. If the Board should report noncompliance to the President, this would be merely "administrative advice" (R. 67), the correctness of which could not be reviewed by the federal courts. *Standard Computing Scale Co. Ltd.* v. *Farrell*, 249 U. S. 571, 574. And if the President should order possession to be taken by the United States of petitioners' business, such action would be taken to prevent a breakdown of essential transportation services which would be harmful to the war effort. Since the petitioners seek relief in this proceeding only against the Board's order (R. 25–26), their fears of a possible exercise by the President of his seizure powers could not be removed even if the order were enjoined or annulled.

2. The Board's order, as an incident in the process of governmental conciliation of labor disputes during the war, represented an effort to adjust by administrative action a controversy threatening to disrupt a function essen-

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cerned a suit to enjoin disclosure of information alleged to be confidential. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, not only arose under special statutory provisions for judicial review, but also involved immediate interference with contractual relationships.

tial to the prosecution of the war. The wage increase proposed by the Board was accompanied by a recognition by the Director of Economic Stabilization and the Price Administrator that it might require an increase in the rates chargeable by the petitioners (R. 50–51). The issuance of an injunction in these circumstances may have constituted an abuse of equitable discretion, whatever the scope of judicial review. "A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, * * * would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer." *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; cf. *Hecht Co.* v. *Bowles*, 321 U. S. 321; *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672. The District Court's refusal to review the Board's order is thus consistent with the national policy manifested in the War Labor Disputes Act, whose legislative history, set forth in the opinion of the court below (R. 63–65), shows that Congress plainly did not intend to subject the Board's orders to judicial proceedings, either for enforcement or review. *National War Labor Board* v. *Montgomery Ward & Co.*, App. D. C., No. 8732, decided July 19, 1944; cf.

Switchmen's Union v. *Mediation Board*, 320 U. S. 297, 305.[5]

CONCLUSION

The question presented, while important in the abstract, can arise only as to orders issued prior to June 25, 1943, when the War Labor Disputes Act became law. In view of the clear correctness of the decision below, we believe further review is unnecessary, particularly in the absence of any conflict of authorities. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1944.

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[5] In the court below, the respondents also argued that the petitioners' suit is against the United States, even though it is not named as a formal party. Cf. *Louisiana* v. *McAdoo*, 234 U. S. 627; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 297. If this is so, the absence of congressional consent to the present suit deprives the courts of jurisdiction over the subject matter. *Oregon* v. *Hitchcock*, 202 U. S. 60, 69; *Minnesota* v. *Hitchcock*, *supra*; *Wells* v. *Roper*, 246 U. S. 335, 337; *Louisiana* v. *McAdoo*, *supra*; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. (2d) 288 (C. C. A. 2), certiorari denied, 293 U. S. 603; *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451 (C. C. A. 4), certiorari denied, 291 U. S. 674.

APPENDIX

I

STATUTES INVOLVED

1. The Inflation Control Act of 1942 (56 Stat. 765, 50 U. S. C. App. (Supp. III) 961) provides, in part, as follows:

> SEC. 1. * * * in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; * * *
>
> * * * * * *
>
> SEC. 5. (a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. * * *
>
> * * * * * *
>
> SEC. 11. Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment.

2. The War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App. (Supp. III) 1501) provides, in part, as follows:

> SEC. 7. (a) The National War Labor Board (hereinafter in this section called

the "Board"), established by Executive Order Numbered 9017, dated January 12, 1942, in addition to all powers conferred on it by section 1 (a) of the Emergency Price Control Act of 1942, and by any Executive order or regulation issued under the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes", and by any other statute, shall have the following powers and duties:

(1) Whenever the United States Conciliation Service (hereinafter called the "Conciliation Service") certifies that a labor dispute exists which may lead to substantial interference with the war effort, and cannot be settled by collective bargaining or conciliation, to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute. If in the opinion of the Board a labor dispute has become so serious that it may lead to substantial interference with the war effort, the Board may take such action on its own motion. At such hearing both parties shall be given full notice and opportunity to be heard, but the failure of either party to appear shall not deprive the Board of jurisdiction to proceed to a hearing and order.

(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; the National Labor Re-

lations Act; the Emergency Price Control Act of 1942, as amended; and the Act of October 2, 1942, as amended, and all other applicable provision of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employee under all the circumstances of the case.

* * * * *

II

REGULATIONS INVOLVED

1. Executive Order No. 9017 (January 12, 1942; 7 F. R. 237) reads, in part, as follows:

> WHEREAS by reason of the state of war declared to exist by joint resolutions of the Congress, approved December 8, 1941, and December 11, 1941, respectively (Public Laws Nos. 328, 331, 332, 77th Congress), the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and
>
> WHEREAS as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adjustment of such disputes;
>
> NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered:

1. There is hereby created in the Office for Emergency Management a National War Labor Board, hereinafter referred to as the Board. The Board shall be composed of twelve special commissioners to be appointed by the President. Four of the members shall be representative of the public; four shall be representative of employees; and four shall be representative of employers. The President shall designate the Chairman and Vice-Chairman of the Board from the members representing the public. The President shall appoint four alternate members representative of employees and four representative of employers, to serve as Board members in the absence of regular members representative of their respective groups. Six members or alternate members of the Board, including not less than two members from each of the groups represented on the Board, shall constitute a quorum. A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board.

* * * * *

3. The procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement. (b) If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute. (c) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board, provided, however, that

the Board in its discretion after consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board.

2. Executive Order No. 9250 (October 3, 1942; 7 F. R. 7871) reads, in part, as follows:

TITLE I—ESTABLISHMENT OF AN OFFICE OF ECONOMIC STABILIZATION

1. There is established in the Office for Emergency Management of the Executive Office of the President an Office of Economic Stabilization at the head of which shall be an Economic Stabilization Director (hereinafter referred to as the Director).

* * * * *

TITLE II—WAGE AND SALARY STABILIZATION POLICY

1. No increases in wage rates, granted as a result of voluntary agreements, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases.

2. The National War Labor Board shall not approve any increase in the wage rates prevailing on September 15, 1942, unless such increase is necessary to correct maladjustments or inequalities, to eliminate substandards of living, to correct gross inequalities, or to aid in the effective prosecution of the war.

Provided, however, that where the National War Labor Board or the Price Administrator shall have reason to believe that a proposed wage increase will require a change in the price ceiling of the commodity or service involved, such proposed increase, if approved by the National War Labor Board, shall become effective only if also approved by the Director.

* * * * *

TITLE III—ADMINISTRATION OF WAGE AND SALARY POLICY

1. Except as modified by this Order, the National War Labor Board shall continue to perform the powers, functions, and duties conferred upon it by Executive Order No. 9017, and the functions of said Board are hereby extended to cover all industries and all employees. The National War Labor Board shall continue to follow the procedure specified in said Executive Order.

2. The National War Labor Board shall constitute the agency of the Federal Government authorized to carry out the wage policies stated in this Order, or the directives on policy issued by the Director under this Order. The National War Labor Board is further authorized to issue such rules and regulations as may be necessary for the speedy determination of the propriety of any wage increases or decreases in accordance with this Order, and to avail itself of the services and facilities of such State and Federal departments and agencies as, in the discretion of the National War Labor Board, may be of assistance to the Board.

* * * * *

3. Executive Order No. 9328 (April 8, 1943; 8 F. R. 4681) reads, in part, as follows:

> 2. The National War Labor Board, the Commissioner of Internal Revenue and other agencies exercising authority conferred by Executive Order No. 9250 or Executive Order No. 9299 and the regulations issued pursuant thereto over wage or salary increases are directed to authorize no further increase in wages or salaries except such as are clearly necessary to correct substandards of living, provided that nothing herein shall be construed to prevent such agencies from making such wage or salary readjustments as may be deemed appropriate and may not have heretofore been made to compensate, in accordance with the Little Steel Formula as heretofore defined by the National War Labor Board, for the rise in the cost of living between January 1, 1941, and May 1, 1942. * * *
>
> * * * * *

4. Executive Order No. 9370 (August 16, 1943; 8 F. R. 11463) reads, in part, as follows:

> AUTHORIZING THE ECONOMIC STABILIZATION DIRECTOR TO TAKE CERTAIN ACTION IN CONNECTION WITH THE ENFORCEMENT OF DIRECTIVES OF THE NATIONAL WAR LABOR BOARD
>
> By virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered:
>
> In order to effectuate compliance with directive orders of the National War Labor Board in cases in which the Board reports to the Director of Economic Stabi-

lization that its orders have not been complied with, the Director is authorized and directed, in furtherance of the effective prosecution of the war, to issue such directives as he may deem necessary:

(a) To other departments or agencies of the Government directing the taking of appropriate action relating to withholding or withdrawing from a non-complying employer any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government, until the National War Labor Board has reported that compliance has been effectuated;

* * * * *

(c) To the War Manpower Commission, in the case of non-complying individuals, directing the entry of appropriate orders relating to the modification or cancellation of draft deferments or employment privileges, or both.

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